

1994

# Evelyn Muir v. Apache Nitrogen Products and W.H. Burt Explosives v. Douglas Bailey : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 940553-CA  
IN THE UTAH COURT OF APPEALS

EVELYN MUIR,

Plaintiff and Appellant,

vs.

APACHE NITROGEN PRODUCTS  
and W.H. BURT EXPLOSIVES,

Defendants and Appellees,

vs.

DOUGLAS BAILEY,

Third-party Defendant

APPELLANT'S BRIEF

Appeal No. 940553-CA

(Argument Priority 15)

APPEAL FROM THE SEVENTH DISTRICT COURT, GRAND COUNTY  
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Utah Court of Appeals

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Marilyn M. Branch  
Clerk of the Court

EVELYN MUIR,	)	
	)	
Plaintiff and Appellant,	)	APPELLANT'S BRIEF
	)	
vs.	)	Appeal No. 940553-CA
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and W.H. BURT EXPLOSIVES,	)	
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	)	
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	)	
Third-party Defendant	)	
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### **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction under U.C.A. §78-2a-3(2)(k) over this final judgment entered by the Seventh District Court in Grand County.

#### **STATEMENT OF ISSUE ONE**

DAVIS COUNTY IS A PROPER VENUE FOR TRIAL, AND IT WAS REVERSIBLE ERROR TO PRECLUDE PLAINTIFF FROM ATTENDING THE TRIAL OF HER OWN CASE BY HOLDING IT IN GRAND COUNTY.

#### **STANDARD OF REVIEW:**

The question of whether Davis County is a proper venue for trial raises a question of law. The Court of Appeals reviews questions of law for correctness, giving no deference to the trial court. Reeves v. Gentile, 813 P.2d 111 (Utah 1991).

#### **PRESERVATION OF ISSUE IN THE TRIAL COURT:**

Plaintiff filed a Motion for Change of Venue to Davis County on May 27, 1993. (R. 278) The Motion was denied by the trial court on July 8, 1993 (R. 464) Plaintiff filed a superseding Motion for Change of Venue to Davis County on November 30, 1993. (R. 506) The Superseding Motion was denied by the trial court on January 3, 1994. (R. 924)

#### **STATEMENT OF ISSUE TWO**

IT WAS REVERSIBLE ERROR TO DIRECT A VERDICT ON PLAINTIFF'S NEGLIGENCE AND BREACH OF WARRANTY CLAIMS. THE BLASTER'S HANDBOOK CANNOT NEGATE DEFENDANTS' NEGLIGENT FAILURE TO WARN AND INSTRUCT, AS IT WAS NOT ADMITTED INTO EVIDENCE.

#### **STANDARD OF REVIEW:**

A directed verdict presents a question of law that the Court of Appeals reviews for correctness, giving no deference to the trial court, and the directed verdict cannot stand when there is

a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in the losing party's favor or if reasonable minds could differ. Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah App. 1991), affirmed, 862 P.2d 1342 (Utah 1993); Penrod v. Carter, 737 P.2d 199 (Utah 1987).

#### **PRESERVATION OF ISSUE IN THE TRIAL COURT:**

The second claim for relief in Plaintiff's Complaint was for breach of implied warranty. (R. 8; SR. 8) The third claim for relief in Plaintiff's Complaint was for "negligently failing to provide sufficient instructions and/or warnings concerning the use of the safety fuse in blasting operations" to the late Wallace A. Muir. (R. 10; SR. 10) The trial court granted a directed verdict as to the second and third claims for relief. (R. 1170), allowing only the first claim for relief for product liability to be tried by the jury.

#### **DETERMINATIVE LAW**

##### **RULE**

U.R.C.P. 50(a)

#### **STATEMENT OF THE CASE**

##### **NATURE OF THE CASE**

This case arises out of a mine explosion that killed Plaintiff's late husband, Wallace A. Muir, while he was using safety fuse manufactured by Apache Nitrogen Products in Benson, Arizona, and sold by W. H. Burt Explosives, Inc., at its store in Davis County, Utah.



## TRIAL COURT PROCEEDINGS

Evelyn Muir and several others brought an action in the Seventh District Court against Apache and W. H. Burt for 1. product liability; 2. breach of implied warranty; and, 3. negligently failing to provide sufficient instructions and/or warnings concerning the use of safety fuse used in blasting operations. (R. 1) The trial court dismissed the Complaint based on predecessor counsel's failure to timely issue summonses. (R. 258) Successor counsel thereupon filed a successor action within one year under the Utah Saving Statute. (SR. 1) The trial court dismissed this second Complaint with prejudice on the grounds that the first case had never been commenced within due time, and therefore the Plaintiffs could not rely on the Utah Saving Statute. (SR. 175)

The undersigned successor counsel then successfully appealed both cases to the Utah Supreme Court in 1990, and the Utah Supreme Court reversed and remanded both cases to the trial court in 1993. Muir v. W.H. Burt Explosives, Inc., 851 P.2d 645 (Utah 1993). The Supreme Court Remittitur was filed in the trial court on May 26, 1993, and appears in the record unindexed immediately after SR. 194. The next day, on May 27, 1993, Plaintiff filed a Motion for Change of Venue to Davis County. (R. 278) That Motion was denied by the trial court. (R.468) Plaintiff then filed a Superseding Motion for Change of Venue to Davis County. (R. 506) This Superseding Motion for Change of Venue to Davis County was denied by the trial court. (R. 924) In moving for a change of venue to Davis County, Plaintiff notified the trial court that health problems that had developed while the case was on appeal from 1990 to 1993 would preclude her from attending a trial in Grand County and included a letter to that effect from her personal physician. (R. 508) When the case proceeded to a jury

trial in Grand County, Plaintiff was unable to attend and was not personally present for any of the trial. (R. 1166)

#### **TRIAL COURT DISPOSITION**

The trial court directed a verdict on Plaintiff's second and third claims for relief for breach of implied warranty and negligently failing to provide sufficient instructions and/or warnings concerning the use of safety fuse in blasting operations. (R. 1170) The case was submitted to the jury on Plaintiff's first claim for relief for product liability, and the jury returned a special verdict that the safety fuse manufactured by Apache and sold by W. H. Burt was not defective and unreasonably dangerous at the time it was sold to the late Wallace A. Muir. (R. 1163)

#### **FACTS**

1. Safety fuse manufactured by Apache Nitrogen Products was sold to the late Wallace A. Muir on August 26, 1986, at the store of W. H. Burt Explosives, Inc., located in Davis County. (Exhibit 6)

2. The safety fuse was used by Wallace A. Muir to work a mining claim in Duchesne County that had been turned over to his daughter, Linda Muir (and family), in June 1985. (Exhibit 38)

3. Wallace A. Muir, Douglas Bailey, and Marlo Jenkins started work at 7:30 a.m., on September 5, 1986. (Exhibit 38)

4. Bailey stayed outside during the morning while Jenkins and Muir mucked out the previous day's round. (Exhibit 38)

5. When mucking was completed, the two men set up a jackleg and started drilling. (Exhibit 38)

6. Bailey, the only experienced miner, directed Jenkins and Muir where to drill the holes. (Exhibit 38)

7. By mid afternoon a total of 30, 4-foot deep holes had been drilled in the face. (Exhibit 38)

8. The round was then loaded by Bailey and Muir, using capped fuses with 1 stick of dynamite as a primer and ANFO. (Exhibit 38)

9. Jenkins carried the remaining explosives out of the drift leaving Bailey and Muir to spit the loaded drift round. (Exhibit 38)

10. At approximately 2:30 p.m., Jenkins was approximately 50 feet outside the portal when he heard the round start going off. (Exhibit 38)

11. Running inside, he found Bailey crawling out the finger, bleeding heavily. (Exhibit 38)

12. Bailey stopped Jenkins from going any further to see where Muir was. (Exhibit 38)

13. Jenkins assisted Bailey to the portal as the rest of the round went off. (Exhibit 38)

14. Bailey directed Jenkins to turn on the air compressor and run the air hose into the drift as far as he could to clear the blast smoke. (Exhibit 38)

15. A few minutes later, Bailey told Jenkins that he wasn't going to make it unless he received medical treatment soon.

(Exhibit 38)

16. Jenkins and Bailey got in their pickup, leaving Muir in the drift. (Exhibit 38)

17. Jenkins transported Bailey to the Duchesne County Hospital in Roosevelt, Utah, stopping in Neola, Utah, to call the Duchesne County Sheriff's Office to advise them of the accident.

(Exhibit 38)

18. Bailey was left at the hospital for treatment.

(Exhibit 38)

19. Duchesne County Deputy Sheriff Jerry Foote and Jenkins then traveled back to the mine to look for Muir. (Exhibit 38)

20. Another sheriff's deputy and other rescue personnel arrived at the mine site and assisted with the recovery work.

(Exhibit 38)

21. Muir's body was discovered buried under the muck pile.

(Exhibit 38)

22. Muir was dug out and transported to the Duchesne County Hospital where he was pronounced DOA. (Exhibit 38)

23. An autopsy was performed the next day by the Utah State Medical Examiner's office. (Exhibit 38)

24. The cause of death was listed as blast force injuries and compression asphyxia (suffocation.) (Exhibit 38)

25. At the time Muir purchased Apache safety fuse from W. H. Burt in Davis County on August 26, 1986, W. H. Burt provided him with its invoice (Exhibit 6) and with an Apache Powder Company/Coast Fuse "Warnings and Instructions for Transporting, Storing, Handling, and Using Explosive Materials" booklet. (Exhibit 8)

26. The name of the mine is Golden Phoenix, I.D. 42-01986, Duchesne County, Utah. (Exhibit 38)

27. The U.S. Forest Service and Bureau of Land Management were notified in June 1985 and appropriate forms filed. The forest service stated this was not a mine "it fit the definition of a treasure hunt." The State of Utah Natural Resources Division (oil, gas and mining) said this was not mining, just exploratory drilling (assessment work.) (Exhibit 38)

28. The purpose of working these claims was to find an old, abandoned Spanish gold mine that according to legend, is within several feet of where the present Golden Phoenix is located. (Exhibit 38)

29. The claim owner did not have any paid employees, only family and close friends at the site. (Exhibit 38)

30. The accident resulted from the total lack of knowledge of or the respect for the explosives used. (Exhibit 38)

#### **SUMMARY OF ARGUMENT**

1. Wallace A. Muir's total lack of knowledge of or respect for the explosives manufactured and sold to him by the Defendants created a jury question as to Defendants' failure to instruct

and/or warn him. The Blaster's Handbook cannot negate Defendants' negligent failure to warn and instruct, as it was not admitted into evidence.

2. The trial court's incorrect conclusion of law, that Davis County was not a proper venue for trial of this case, caused the trial court to erroneously deny Evelyn Muir's first motion for a change of venue to Davis County, thereby precluding Evelyn Muir from being present at the trial of her own case.

3. The trial court's incorrect conclusion of law, that Davis County was not a proper venue for trial of this case, and incorrect conclusion that she would or could attend trial in Grand County, caused the trial court to erroneously deny Evelyn Muir's superseding motion for a change of venue to Davis County, thereby precluding Evelyn Muir from being present at the trial of her own case.

4. Evelyn Muir's claim for relief for breach of implied warranty should be tried by a jury.

## **ARGUMENT**

### **POINT ONE**

THE THIRD CLAIM FOR RELIEF FOR NEGLIGENTLY FAILING TO INSTRUCT AND WARN SHOULD BE TRIED BY A JURY. THE BLASTER'S HANDBOOK CANNOT NEGATE DEFENDANTS' NEGLIGENT FAILURE TO WARN AND INSTRUCT, AS IT WAS NOT ADMITTED INTO EVIDENCE.

Wallace A. Muir was not an experienced miner. (Fact No. 6) (Exhibit 38) The Blaster's Handbook cannot negate Defendants' negligent failure to warn and instruct, as it was not admitted

into evidence. Whether or not Exhibits 6 and 8 sufficiently warned and instructed him creates a question of fact for the jury. (Fact No. 25) (Exhibits 6 and 8) The trial court incorrectly treated this as a bench trial issue of fact rather than submitting to the jury the question of whether Exhibits 6 and 8 instructed or warned Wallace A. Muir, a question over which reasonable minds could differ.

A reasonable jury could find from Exhibits 6 and 8 that the entire industry is negligent and that the written materials provided to Wallace A. Muir could neither warn nor instruct him as an inexperienced non-miner that the manner in which he used the safety fuse as set forth in Facts No. 3 through No. 9 and in Exhibit 38 could cause him to be killed in an explosion. The fact that confusion remains in the mind of the lay reader of Exhibits 6, 8, and 38 creates a jury question as to the adequacy of the instructions and warnings.

The trial court directed a verdict because the trial court ruled that "the (third-party) Defendant, Doug Bailey, was aware of the rules that he had violated. Regarding Burt Explosives knowledge, or lack of supposed usage of their product, there was no basis for negligence of warning." (R. 1170)

By so ruling, the trial court invaded the province of the jury as to the comparative fault between Defendants Apache and W. H. Burt in negligently failing to instruct or warn and the negligence of third-party Defendant Douglas Bailey.

When the facts are viewed in the light most favorable to Plaintiff, a reasonable jury could conclude that the entire explosives industry is negligent in promulgating warnings and instructions that negligently fail to instruct and/or warn

customers such as Wallace A. Muir who have no prior background or experience in explosives.

Restatement Torts, 2d § 388, restates the laws as follows:

One who supplies directly or through a third person a chattel for another to use is subject to liability in those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

When Exhibit 38 is viewed in the light most favorable to the Plaintiff, which is the correct standard of review because of the directed verdict that was entered in this case, this evidence and the inferences therefrom could allow reasonable minds to differ as to whether W. H. Burt knew or had reason to know that the fuse is or is likely to be dangerous for the use for which it is supplied, inasmuch as blasting is an ultra hazardous activity to begin with. Wallace A. Muir was inexperienced as a miner as set forth in Fact No. 6 and Exhibit 38. His inexperience was further manifested to W.H. Burt when he purchased a handbook from W.H. Burt. (The handbook is referred to in Exhibit 6. An actual handbook was offered as Exhibit 11, but it was not admitted into evidence). The Blaster's Handbook cannot negate Defendants' negligent failure to warn and instruct, as it was not admitted



into evidence. Reasonable minds could therefore differ as to whether W. H. Burt had no reason to believe that Wallace A. Muir would realize the dangerous condition of the safety fuse.

When Exhibits 6 and 8 are read in their entirety, reasonable minds could differ as to whether the industry as a whole, and Apache and W. H. Burt in particular, failed to exercise reasonable care to inform Wallace A. Muir of the dangerous condition of the safety fuse and of the facts which make it likely to be dangerous, and, in particular, warn him that the use to which he put the safety fuse as set forth in Exhibit 38 was dangerous and life threatening.

Furthermore, because of Wallace A. Muir's inexperience, even if the instructions and warnings contained in Exhibits 6 and 8 would be sufficient to instruct and warn an experienced miner, there may still be negligence on the part of W. H. Burt and Apache due to the inexperience of Wallace A. Muir as set forth in Exhibit 38 and manifested by his purchase of a handbook (which was not admitted into evidence). Restatement, Torts 2d, § 390, restates the law as follows:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Evelyn Muir is entitled to have her Third Claim for Relief tried by a jury. It was error for the trial court to shift all of the blame to the victim and the third-party Defendant as a

matter of law by directing a verdict as to the Defendants' negligence when reasonable minds could differ as to the negligence of the Defendants when the evidence set forth in Exhibits 6, 8, and 38, and the inferences that may be drawn therefrom, are viewed in the light most favorable to the Plaintiff, as required under Steffensen v. Smith's Management Corp. supra. Copies of Exhibits 6 and 8, as well as the relevant portions of Exhibit 38, have been appended hereto for the convenience of the reader.

#### POINT TWO

EVELYN MUIR'S FIRST MOTION FOR A CHANGE OF VENUE TO DAVIS COUNTY SHOULD HAVE BEEN GRANTED.

Utah courts long ago settled the question of where a cause of action arises in a defective product case. The cause of action arises both in the county where the product was sold and in the county where the resulting harm occurred. Schramm/Johnson Drug v. Cox, 9 P.2d 399 (Utah 1932). Under this long settled precedent which has never been overruled, the cause of action in this case arose both in Davis County (where the safety fuse was sold to Wallace A. Muir) and in Duchesne County (where the resulting death of Wallace A. Muir occurred).

The trial court erroneously failed to recognize that Davis County was a proper venue for trial, and the appellate court should therefore review the failure to change venue to Davis County as a question of law that is reviewed for correctness, giving no deference to the trial court in this case where the refusal to change venue to Davis County resulted in Evelyn Muir's absence from her own trial due to ill health that precluded her from attending trial in Grand County.

Evelyn Muir and several others, utilizing predecessor counsel, initially filed this case in Grand County where it was dismissed for failure of predecessor counsel to timely issue summonses. Evelyn Muir retained successor counsel and timely took an appeal to the Utah Supreme Court. The matter was pending before the Utah Supreme Court from 1990 to 1993, when the Utah Supreme Court reversed and remanded. Muir v. W.H. Burt Explosives, Inc., 851 P.2d 645 (Utah 1993)

On May 26, 1993, the Utah Supreme Court's Remittitur was filed in the Seventh District Court. (SR, unindexed, immediately after 194) The next day, on May 27, 1993, Evelyn Muir filed a Motion for Change of Venue to Davis County. (R. 278)

The Utah venue statute at U.C.A. § 78-13-7 gives the Plaintiff the right and privilege of choosing and designating the county for trial if venue is available in more than one county. While the case was originally filed in Grand County by predecessor counsel on behalf of Evelyn Muir and others, the Seventh District Court dismissed and ruled that the action had never been commenced within due time in Grand County and that the Seventh District Court lacked jurisdiction.

Therefore, upon reversal and remand by the Supreme Court, Evelyn Muir was free to designate Davis County as the venue for trial, which she promptly did the day after the Remittitur was filed in the trial court.

The change of venue to Davis County should have been granted as a matter of right.

Defendants argued to the trial court that the two-year wrongful death statute of limitations somehow had a bearing on

the change of venue to Davis County, because the initial lawsuit was filed on September 1, 1988 (R.1) and the sale of fuse in Davis County took place more than two-years before that, on August 26, 1986.

This argument should have been rejected by the trial court as containing a fundamental error of law as to the difference between a limitation statute and a venue statute, which the Court of Appeals reviews for correctness, giving no deference to the trial court.

A statute of limitations is jurisdictional, and the court has no ability to alter its force and effect in order to promote the ends of justice, while the court may, upon motion, change the place of trial "when the county designated in the complaint is not the proper county" or "when the convenience of the witnesses and the ends of justice would be promoted by the change. " U.C.A. §78-13-9(1) and (3).

The doctrine of law of the case precludes Defendants from revisiting the statute of limitations issue, which was already decided in Plaintiff's favor by the Utah Supreme Court in 1993.

This did not preclude the trial court from changing venue to Davis County as moved for on May 27, 1993, the day after the Remittitur was filed on May 26, 1993. While the trial court's error in declining to recognize Davis County as a proper venue for trial gives rise to a question of law that is reviewed for correctness, an abuse of discretion standard of review also supports reversal of the trial court, as the trial court has no discretion to erroneously interpret the law, and it was an abuse of discretion to bar Evelyn Muir from being present at her own

trial by refusing to perform the simple act of signing an order changing venue to Davis County.

### POINT THREE

EVELYN MUIR'S SUPERSEDING MOTION FOR A CHANGE OF VENUE TO DAVIS COUNTY SHOULD HAVE BEEN GRANTED.

Evelyn Muir timely sought permission from the Utah Supreme Court to pursue an interlocutory appeal of the denial of her initial Motion for Change of Venue to Davis County. After the Utah Supreme Court declined to consider the matter on an interlocutory basis, Evelyn Muir promptly filed a superseding Motion for Change of Venue to Davis County in which she advised the trial court that her ill health would prevent her from attending her own trial unless venue was changed to Davis County and she grounded her superseding motion on the status of Davis County as the most convenient forum. The trial court again erroneously failed to recognize Davis County as a proper venue for trial, and denied the motion. The Utah Supreme Court again declined to consider that matter on an interlocutory basis. This resulted in a trial in Grand County in which Evelyn Muir was not personally present as the Plaintiff in a wrongful death case.

Defendants and their counsel achieved the result of a wrongful death trial without the widow Plaintiff personally present by opposing Evelyn Muir's motions for change of venue to Davis County, even though counsel for both Defendants practice and live near Davis County and it was less convenient for them and their witnesses to try the case in Grand County. Having willingly endured this inconvenience to themselves and their witnesses in order to secure this tactical advantage because they thought it would make a difference, Defendants are now likely to

argue on appeal that the failure to change venue did not make a difference in this case.

Regardless of whether the absence of the Plaintiff widow was outcome determinative, the failure of the trial court to take reasonable steps to allow her to be present at her own trial by changing the place of trial to Davis County is in and of itself prejudicial to Plaintiff and infringed upon her statutory right to choose the place of trial as Plaintiff as well as her right to be present at the trial of her own case and her "inherent and inalienable right" to not be barred from prosecuting by herself or counsel a civil cause to which she is a party under Article I, § 11 of the Constitution of Utah.

Plaintiff candidly concedes that the first claim for relief presents a genuine jury issue as to whether the safety fuse was defective and unreasonably dangerous, and there is evidence in the record that would have supported either a yes or a no answer in the special verdict. The facts strongly suggest that one of the safety fuses was defective and unreasonably dangerous in that it prematurely completed its burn and caused the fatal blast. However, a reasonable jury could find that while this defect was dangerous, it was not unreasonably dangerous in light of the ultra hazardous nature of the activity, or could also disregard the evidence about the long interval of time between the premature blast and the subsequent blasts as set forth in the Mine Safety and Health Administration investigation report at facts 10 through 13 above from Exhibit 38 and conclude that Wallace A. Muir was not in due regard for his own safety and was killed in a blast that was not the result of a defectively fast segment of fuse. Inasmuch as the eye witness Wallace A. Muir died in the explosion, and the allegedly defective segment of the safety fuse was destroyed in the explosion, the jury is left with

circumstantial evidence that would let it go either way in its verdict. In light of this genuine jury issue, subtle nuances would have as much of an effect on the verdict as the evidence itself. This is why Defendants fought so hard to secure the tactical advantage of having the widow Plaintiff absent from trial, because even though neither side can quantify what subtle effect this had on the jury, the Plaintiff certainly would have been better off if she had been there and the defense was certainly glad that she was absent.

However, the issue here is not whether the erroneous failure to change venue would have led to a different jury verdict in Davis County with the Plaintiff personally present at her trial there, but the issue is one of denial of substantive rights, fundamental fairness and due process, and the fact that the absence from one's own trial is in and of itself prejudicial, regardless of whether one can objectively demonstrate that his or her presence would have made a difference to the jury.

During this decade, correspondence from the courts of the State of Utah has started containing assurances that persons with disabilities may notify the court of the disabilities in order to secure court assistance in gaining access to the courtroom. If, instead of refusing to change the place of trial to Davis County, this was a case wherein a trial judge had refused to open the doors of his or her courtroom to a disabled person who was waiting outside (after erroneously concluding that there was no legal provision preventing a judge from barring a Plaintiff in such a manner), the Court of Appeals would have no trouble reversing and remanding, and would not get involved in analysis of whether making the Plaintiff wait outside during the trial had changed the verdict in the case.

Nor would an appellate court in Utah tolerate the actions of a trial judge who refused to provide reasonable means for a disabled person to gain access to the courthouse building because the disabled person had notified the court of the disability by letter from a physician rather than by affidavit. To the extent that the trial judge exalted form over substance in such a manner in the Seventh District Court in this case, this is in conflict with a ruling in another case by the Third District Court in which an unsworn letter from a physician was found to be legally sufficient. A copy of that ruling is annexed hereto from the case of Stone v. Stone, Third District Court No. 904902893 DA. Again, during the 1990s courts in their notices have routinely invited litigants to notify the courts of physical disabilities that require the special attention of the courts in order to give these people special assistance in gaining access to courtroom facilities, and no particular form is required.

It was sufficient in this case for the Plaintiff to notify the court that she would be unable to attend trial if it was held in Grand County. She bolstered that with a letter from her physician, all provided well in advance of trial, and all of which turned out to be true when she was absent from trial in Grand County due to her ill health, contrary to the trial court's incorrect conclusion that she would or could attend trial in Grand County.

The trial court refused to change venue to Davis County under the incorrect conclusion of law that Davis County was not a proper venue for trial. Inasmuch as Davis County is a proper venue for trial, this case should be reversed and remanded.



#### POINT FOUR

THE SECOND CLAIM FOR RELIEF FOR BREACH OF IMPLIED WARRANTY SHOULD BE TRIED BY A JURY.

Of the sixty exhibits offered into evidence at the trial of the case, fifty eight were admitted into evidence. Of the fifty eight exhibits admitted into evidence, Exhibit 6 and Exhibit 8 constitute the written materials that were provided to Wallace A. Muir at the time he purchased the Apache safety fuse from W. H. Burt in Davis County on August 26, 1986.

Exhibit 6 constitutes delivery ticket #4412 listing Muir as the customer, but showing the signature of Douglas Bailey as the receiver, not Muir.

Exhibit 8 constitutes "Warnings and Instructions for Transporting, Storing, Handling, and Using Explosive Materials" from Apache Powder Company/Coast Fuse.

Copies of both exhibits are appended to this Brief for the convenience of the reader.

Conspicuously absent is any language to exclude or modify the implied warranty of merchantability. Such an exclusion or modification must be in writing and conspicuous under Utah law, and there is no such exclusion or modification. See U.C.A. § 70A-2-316(2) and (3)(a); Billings Yamaha v. Rick Warner Ford, Inc., 681 P.2d 1276 (Utah 1984); Christopher v. Larsen Ford Sales, Inc., 557 P.2d 1009 (Utah 1976); Chrysler Credit Corp. v. Burns, 527 P.2d 655 (Utah 1974).

When the facts are viewed in the light most favorable to the Plaintiff, which is the proper standard of review since the verdict was directed and the second claim for relief did not go to the jury, reasonable minds could find that one of the fuses completed its burn prematurely and was not fit for the ordinary purposes for which it was used and was not of even kind and quality. See U.C.A. § 70A-2-314(1) and (2). The issue of fact for the jury under a breach of implied warranty of merchantability is different than the issue under strict product liability. Under strict product liability the jury could find that the product was defective and dangerous, but that the danger was not unreasonable in light of the ultra hazardous activity being engaged in, thereby precluding the Plaintiff from recovering in tort under strict product liability. However, under the second claim for relief, the jury could find that the safety fuse was defective and dangerous and unfit for the ordinary purposes for which said fuse is to be used, thereby allowing the Plaintiff to recover inasmuch as the unreasonableness of the danger required for strict liability in tort is not present in the implied warranty claim.

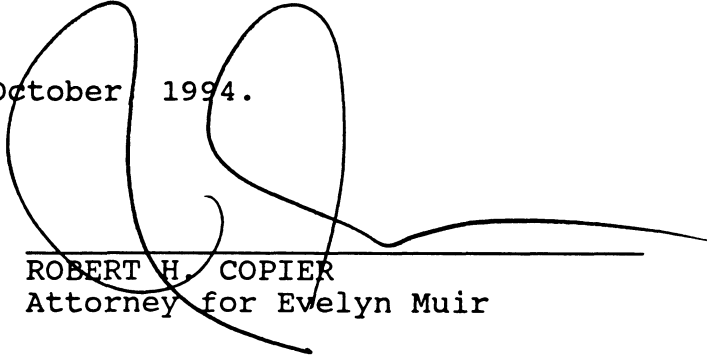
This result is reached because while one would have expected a seller of safety fuse to have effectively excluded the implied warranty of merchantability, this was not achieved in Exhibits 6 and 8. Therefore, even though strict product liability in tort arose in the law because of the difficulty in recovering when the implied warranty of merchantability had been effectively excluded, that difficulty is not present in this case where there was no such effective exclusion of the implied warranty of merchantability, and the Plaintiff should have been allowed to go to a jury on the second claim for relief.

Inasmuch as the customer died in the explosion, he was not in a position to give notice of the breach to the Defendants. Whether or not actual notice to W. H. Burt on July 5, 1989 (R.16) constituted notice within a reasonable time in advance of filing Case No. 840705873 on November 27, 1989, (SR. 1), is a question of fact for the jury. U.C.A. § 70A-2-607(3)(a).

### CONCLUSION

This consolidated case should be reversed and remanded with a mandate to change venue to Davis County for a jury trial on all three claims for relief, based on Plaintiff's absence from the jury trial as to her first claim for relief and based on the trial court's error in failing to allow jury trial on the second and third claims for relief.

DATED this 3 day of October 1994.



\_\_\_\_\_  
ROBERT H. COPIER  
Attorney for Evelyn Muir

### MAILING CERTIFICATE

On this 3 day of October, 1994, I did mail a true and correct copy of the foregoing APPELLANT'S BRIEF to Roger P. Christensen at 175 So. West Temple, Suite 510, Salt Lake City, Utah 84101 and Shawn Draney at P.O. Box 45000, Salt Lake City, Utah 84145.



\_\_\_\_\_  
wp51\cop\muir.brf

## **ADDENDUM**

**A**

ROBERT H. COPIER, 727  
Attorney for the Plaintiff  
200 Metro Place  
243 East 400 South  
SLC UT 84111-2803  
Telephone 531-0099

FILED JAN 17 1994  
THIRD JUDICIAL DISTRICT

JAN 20 1994

SALT LAKE COUNTY  
By R. Grotas

---

THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

WILLIAM TAYLOR STONE,  
Plaintiff,

ORDER

vs.

Civil No. 904902893DA

CATHERINE CHERELLE STONE,  
Defendant.

Judge Richard H. Moffat

---

This matter came on regularly for hearing before this court on December 16, 1993. Counsel for plaintiff had previously submitted an unsworn letter from plaintiff's physician advising against travel to Salt Lake County by the plaintiff for the hearing due to some pains plaintiff was experiencing in his abdomen for which he was receiving medical treatment and which had not been cured. Defendant, through counsel, objected to the legal sufficiency of the unsworn letter from plaintiff's physician. The court denied defendant's objection, found the unsworn letter from plaintiff's physician to be legally sufficient to establish plaintiff's inability to travel to Salt Lake County for the hearing, and continued the hearing. Wherefore, with good cause appearing in the premises, and being fully advised, the court orders the parties to spend the time prior to the next hearing working on a stipulation and agreement as to income and child support pursuant to the guidelines

DATED this 20<sup>th</sup> day of January, 1994.

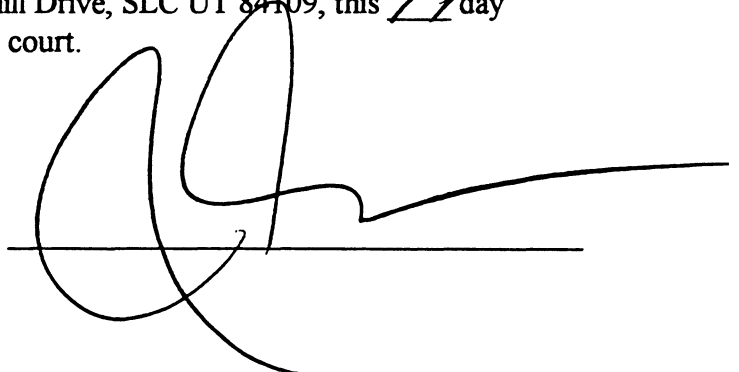
BY THE COURT;

  
JUDGE RICHARD H. MOFFAT  
Third District Court Judge



#### CERTIFICATE OF MAILING

A true copy of the foregoing was mailed by first-class mail, postage prepaid, to John Walsh, Esq., Suite 270, 2319 Foothill Drive, SLC UT 84109, this 19 day of January, 1994, prior to signing by the court.

  
\_\_\_\_\_

FILED

JUL 08 1993

CLERK OF THE COURT

BY

Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR GRAND COUNTY  
STATE OF UTAH

EVELYN MUIR,

Plaintiff,

vs

APACHE NITROGEN PRODUCTS,  
INC., W.H. BURT EXPLOSIVES,  
INC., JOHN DOES I-X,  
Defendants,

DOUGLAS BAILEY,

Third-Party  
Defendant.

RULING ON MOTION FOR  
CHANGE OF VENUE

Civil No. 890705873  
880705719  
Judge Lyle R. Anderson

Plaintiff has filed a Motion for Change of Venue asking that the Court transfer this case to Davis County for trial. Defendants have objected.

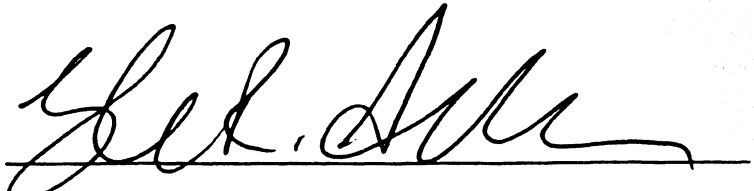
This action was filed in Grand County, Utah, the place of residence of defendant W.H. Burt Explosives, by plaintiff. Another action arising out of the same accident was filed in Salt Lake County, but transferred to Grand County for trial on motion of the defendants. Venue, as an initial matter, was proper in either Grand County, where one defendant resided, or Duchesne County, where the accident occurred. Plaintiff chose Grand County. The Court is not persuaded that the convenience of the witnesses, as a whole, would be served by a change of venue to Davis County, or that venue would even be proper there. The convenience of counsel is not relevant to a venue decision.

RULING ON MOTION FOR  
CHANGE OF VENUE  
Civil No. 5873  
Page 2

The Motion for Change of Venue is denied. Counsel for W.H. Burt Explosives, Inc., is directed to prepare a formal order for the Court's signature.

This case is scheduled for trial beginning at 9:30 a.m. on January 24-28, 1994, at the Grand County Courthouse.

DATED this 8th day of July, 1993.

  
Lyle R. Anderson, District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on July 8, 1993, I mailed a true and correct copy of the foregoing RULING ON MOTION FOR CHANGE OF VENUE, postage prepaid, to the following:

Shawn E. Draney  
SNOW, CHRISTENSEN & MARTINEAU  
Post Office Box 4500  
Salt Lake City, UT 84145

Robert Copier, Esq.  
Attorney for Plaintiffs  
243 East 400 South, Suite 200  
Salt Lake City, UT 84111

Roger P. Christensen  
CHRISTENSEN, JENSEN & POWELL  
175 South West Temple, Suite 510  
Salt Lake City, UT 84101

  
Deputy Clerk



FILED JAN - 3 1994

CLERK OF THE COURT  
BY Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY  
STATE OF UTAH

EVELYN MUIR,  
Plaintiff,

vs

APACHE NITROGEN PRODUCTS,  
INC., a New Jersey corporation,  
W.H. BURT EXPLOSIVES, INC.,  
a New Mexico corporation, and  
JOHN DOES I-X,  
Defendants,

vs

DOUGLAS BAILEY,  
Third-Party  
Defendant.

RULING ON SUPERSEDING  
MOTION TO CHANGE VENUE

Civil No. 880705719  
Judge Lyle R. Anderson

Plaintiff Evelyn Muir ("Muir") has filed a Superseding Motion for Change of Venue to Davis County, to which defendants have objected, and Muir has filed a reply. Even though neither party has submitted the motion for decision, the proximity of the trial warrants the exercise of discretion to decide the motion without a notice to submit.

The only issue raised by Muir in the superseding motion that was not addressed in her first motion is her claim that her ill health warrants a change of venue. That claim is supported only by an unsworn statement from Dennis D. Harper, D.O., that the condition of Muir would probably worsen if she were required to live in a motel and eat in restaurants. Muir has presented no

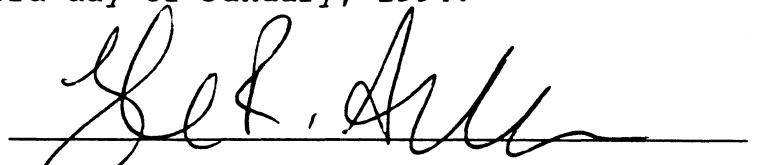
RULING ON SUPERSEDING  
MOTION TO CHANGE VENUE  
Civil No. 880705719  
Page 2

evidence that living in a motel would mean she would have to eat in restaurants. The Court is aware of at least one motel in Moab, the Redstone Inn, that has kitchenettes.

The Court is not convinced by the unsworn statement of Dennis D. Harper, D.O., that Muir would be unable to attend a trial in Grand County, Utah. The statement indicates that Muir has suffered this malady for two and one-half years, yet Muir did not raise this ground in her first motion for change of venue. The Court is not aware of any authority for changing the place of trial because of poor health of a party.

When this action was commenced, venue lay properly in Duchesne or Grand County. Muir chose Grand County. She has not submitted evidence or authority warranting the change she seeks. The motion is denied with prejudice. No further motions for change of venue will be considered.

DATED this 3rd day of January, 1994.



Lyle R. Anderson, District Court Judge

5983                    **EVELYN MUIR - Deposition**

Mr. Copier read parts of deposition of Evelyn Muir - direct exam. Mr. Christensen cross examined by reading parts of the deposition. Mr. Draney had no cross.

**TAPE: 38.7**

1565            The jury was excused; court in session out of hearing of the jury to hear argument re: the deposition of Melvin Cook; it would be permitted or not permitted, perhaps sentence by sentence, to be used.

2381            Jury returned and seated.

2340                    **DR. MELVIN COOK - Deposition**

Mr. Copier, for direct examination, read parts of the deposition. There being numerous objections, the jury was excused and court was in session out of the hearing of the jury. Mr. Draney moved to strike earlier testimony, based on no foundation. Court rules that his opinion doesn't come in. After further argument, Court allows edited portions in. Bailiff escorted jury into courtroom.

**TAPE: 38.8**

1455            Mr. Copier continued direct of Dr. Cook's deposition.

1716            Mr. Draney gave cross exam;

2368            Court in recess for 10 minutes.  
Court reconvened; jury in jury box.

2375            Mr. Christensen - cross exam.

2428            Re-direct by Mr. Copier.

2692                    **PLAINTIFF RESTS**

2735            Jury excused and admonished; court in session out of the hearing of the jury for counsel to submit motions to the Court. Upon representation from Mr. Draney, Court will reserve ruling on strict liability until after the defendant presents its case. Mr. Christensen joins with Apache for directive verdict on the basis of independent negligence.

4032            The jury was escorted back into the courtroom to be excused for the day and to return tomorrow morn at 9:00 a.m.

Court admonished the jury not to discuss the case with anyone. Court continued in session out of the hearing of the jury.

Mr. Copier responded to the motions. Mr. Draney moved the Court for directive verdict on negligence of warning. Mr. Christensen joined in the motion. Court ruled that the defendant Doug Bailey was aware of the rules that he had violated. Regarding Burt's Explosives knowledge, or lack of supposed usage of their product, there was no basis for negligence of warning. That claim was dismissed. Ruling on claim for special damages was reserved.

**JAN 26, 1994**

5767 Court in recess - 4:45 p.m.

5686 Court reconvened 9:00 a.m. Jury present and seated.

6040           **OPENING STATEMENT - Roger Christensen**

**TAPE: 38.9**

**SWORN AND TESTIFYING FOR THE DEFENSE**

2660           **WILLIAM WRIGHT WILSON - Deposition**

Roger Christensen read questions from part of the deposition; Robert Willis read answers. Mr. Copier objected to the use of the deposition. Objection was overruled.

4590 Jury excused and admonished.

Court in session out of hearing of the jury to discuss what part of the deposition was allowed in and what was excluded. Court allows in exhibit #D-38 with the possible exception of page 4, upon conclusion of deposition testimony.

5452 Jury return; reading continued.

**TAPE: 38.10**

1374 Court in recess for break; jury excused and admonished. Court back in session; jury present and seated.

1405           Cross exam of Mr. Wilson's deposition. Mr. Copier read the questions, Mr. Robert Willis read the answers.

Albany City, Utah (801)292-2541  
Albany, N. Mex. (505)325-8879  
Albany, Colorado (303)865-2223  
Albany, Idaho (208)745-7106

# W. H. BURT EXPLOSIVES, INC.

IRECO EXPLOSIVES

DELIVERY  
TICKET

S 4412

PHONE: 259-7181 • MOAB, UTAH 84532 • P.O. BOX 850

P.O. NO. \_\_\_\_\_ DATE 5-26-80

PERMIT NO. \_\_\_\_\_

SHIPPED FROM SLC-100 VIA WILLIAMS

WORK LOCATION \_\_\_\_\_  
(Jobsite) (County) (State)

Late Charges will be added on all past due accounts Rate of 1½% per month or 18% per year.

NUMBER & TYPE OF PACKAGES	PROPER SHIPPING NAME	HAZARD CLASS	WEIGHT (SUB TO CORR.) OR QUANTITY	Exemption DOT - E	Class or Rate	PLACARDS APPLIED OR PROVIDED
	High Explosive	Class A Explosive				<input type="checkbox"/> EXPLOSIVES A <input type="checkbox"/> BLASTING AGENT <input type="checkbox"/> FLAMMABLE <input type="checkbox"/> EXPLOSIVES B
	Detonator	Class A Explosive				
	Blasting Caps	Class A Explosive				
	Detonator	Class C Explosive				
	Blasting Caps - (1000 or Less)	Class C Explosive				<div>PLAINTIFF'S EXHIBIT 6 5997</div> <div>DEFENDANT'S EXHIBIT 6 5719</div>
	Blasting Agent - N.O.S.	Blasting Agent				
	Ammonium Nitrate - Fuel Oil Mixture	Blasting Agent				
	Cordeau Detonant Fuse	Class C Explosive				
	Safety Fuse	Class C Explosive				
	Fuse Lighters	Class C Explosive				
	Igniter Cord	Class C Explosive				
	Igniters	Class C Explosive				
	Wire - Copper or Iron	None				
	Poles - Wood - Tamping	None				
	Hand Tools - T - Power	None				
	Batteries Alkaline Dry - All Type	None				

Pkgs.	Quantity	DESCRIPTION, BRAND and SIZE	Unit Price	Per	Amount
1	100	UNICOR 1X8 JUNE 203051	98.25	C	9825
			3.50	C	350
3	1250	BLASTING TX 0-1086	13.00	C	16250
			75	C	9375
1	200	BLASTING TX 0-1086	25.00	C	5000
			70	C	1400
1	1000	BLASTING TX 0-1086 FUSE	67.95	M	75950
1	1	WYLER GUN	150.00	F	15000
1	1	BLASTING TX 0-1086	20.00	F	2000
					57000
					3280
					60338

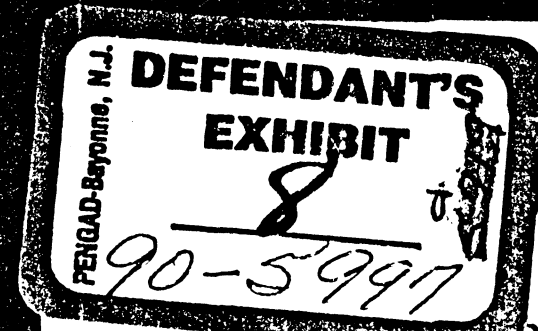
It is to certify that the above named materials are properly classified, bed, packaged, marked and labeled and are in proper condition for transportation according to the applicable regulations of the Department of Transportation.

Buyer assumes all risk and liabilities for results obtained by the use of the material covered by this order. Buyer acknowledges that there may be Federal and/or State laws regulating the use and/or possession of the materials covered by this order and buyer assumes full responsibility for compliance with said laws.

SHIPPER: W. H. BURT EXPLOSIVES, INC.

RECEIVER: W. H. BURT EXPLOSIVES, INC.  
Received the above described items in good condition except as noted.

I have received the pamphlet "Prevention of Accidents in the use of Explosives." I will heed its warnings and follow its instructions.



## WARNINGS AND INSTRUCTIONS

### For Transporting, Storing, Handling, and Using Explosive Materials

ADAPTED BY THE INSTITUTE OF MAKERS OF EXPLOSIVES, DECEMBER 1985

**WARNING:** Read this booklet before using any explosive material.

**PREVENTION OF ACCIDENTS:** The misuse of any explosive material can *kill or injure* you or others. Prevention of accidents depends on *careful planning* and the use of *proper procedures*. This booklet is designed to *help you use explosive materials safely*.

**GENERAL WARNINGS:** All explosive materials are *dangerous* and must be carefully transported, handled, stored and used following proper safety procedures or under competent supervision. **ALWAYS** follow federal, state and local laws and regulations. **ALWAYS** lock up explosive materials and *keep from children* and unauthorized persons.

The explosives in this package were manufactured and packed under careful supervision and inspection. However, the contents may become damaged by improper handling or storage beyond the control of the manufacturer; therefore, they should be carefully inspected before using.

**LOST and STOLEN  
EXPLOSIVES**  
**Call ATF**  
**TOLL FREE**  
**800-424-9555**

**WARNING:**  
**LOCK UP BLASTING CAPS**  
**KEEP FROM CHILDREN**  
Avoid excessive heat from sources such as flame-producing devices, impact, friction, and electrical impulse. Read and heed these instructions and warnings.

## APACHE POWDER COMPANY / COAST FUSE

INCORPORATED

MANUFACTURERS OF EXPLOSIVES AND CHEMICALS

P.O. BOX 700

BENSON, ARIZONA 85602 - U.S.A.

(602) 586-2217



THESE WARNINGS AND INSTRUCTIONS CANNOT COVER EVERY SITUATION WHICH MIGHT OCCUR. IF YOU HAVE ANY QUESTIONS ON THE USE OF AN EXPLOSIVE MATERIAL, *CONTACT YOUR SUPERVISOR OR THE MANUFACTURER.*

The Institute of Makers of Explosives publishes a number of Safety Library Publications (SLPs) addressing a variety of subjects all pertaining to safety and its application to the manufacture, transportation, storage, handling and use of commercial explosive materials. Many of the industry recommendations set forth in these publications have been adopted by federal, state and local regulatory agencies:

- SLP 1 Construction Guide for Storage Magazines
- SLP 2 American Table of Distances
- SLP 3 Suggested Code of Regulations
- SLP 4 Warnings and Instructions
- SLP 12 Glossary of Commercial Explosives Industry Terms
- SLP 14 Transportation and Distribution Handbook
- SLP 17 Safety in the Transportation, Storage, Handling and Use of Explosive Materials
- SLP 20 Safety Guide for the Prevention of Radio Frequency Radiation Hazards  
in the Use of Electric Blasting Caps
- SLP 21 Destruction of Commercial Explosive Materials  
(A statement of policy – not a “how to” publication)
- SLP 22 Recommendations for the Safe Transportation of Detonators in the Same Vehicle  
with Certain Other Explosive Materials

Cost data and purchasing instructions are available from the IME office at 1120 Nineteenth Street, NW, Suite 310, Washington, DC 20036-3605, phone (202) 429-9280, or from your explosive materials supplier.

## DEFINITIONS

● **Explosive Materials:** These include explosives, blasting agents and detonators. The term includes, but is not limited to, dynamite and other high explosives, slurries and water gels, emulsions, blasting agents, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord and igniters. A list of explosive materials determined to be within the coverage of “18 U.S.C. Chapter 40 Importation, Manufacture, Distribution and Storage of Explosive Materials” is issued at least annually by the Director of the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury.

The United States Department of Transportation classifications of explosive materials used in commercial blasting operations are not identical with the statutory definitions of the Organized Crime Control Act of 1970

Title 18 U.S.C., Section 841. To achieve uniformity in transportation, the definition of the United States Department of Transportation in Title 49 Transportation CFR, Parts 1-999 subdivides these materials into:

Class A Explosives – Detonating, or otherwise maximum hazard

Class B Explosives – Flammable hazard

Class C Explosives – Minimum hazard

Blasting Agents – See definition for Blasting Agent

- **Explosives:** Any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion.

- **Blasting Agent:** An explosive material which meets prescribed criteria for insensitivity to initiation.

For storage, Title 27 CFR, Section 55.11 defines a blasting agent as any material or mixture, consisting of fuel and oxidizer, intended for blasting, not otherwise defined as an explosive; provided, that the finished product, as mixed for use or shipment, cannot be detonated by means of a number 8 test blasting cap when unconfined (BATF regulation).

For transportation, Title 49 CFR defines a blasting agent as a material designed for blasting which has been tested in accordance with Section 173.114a and found to be so insensitive that there is very little probability of accidental initiation to explosion or transition from deflagration to detonation (DOT regulation).

- **Detonator:** Any device containing any initiating or primary explosive that is used for initiating detonation. A detonator may not contain more than 10 grams of total explosives by weight, excluding ignition or delay charges. The term includes, but is not limited to, electric blasting caps of instantaneous and delay types, blasting caps for use with safety fuses, detonating cord delay connectors, and nonelectric instantaneous and delay blasting caps which use detonating cord, shock tube, or any other replacement for electric leg wires.

- **Primer:** A unit, package, or cartridge of explosives used to initiate other explosives or blasting agents, and which contains:

1. A detonator, or
2. Detonating cord to which is attached a detonator designed to initiate the detonating cord.

- **Safety Fuse:** A flexible cord containing an internal burning medium by which fire or flame is conveyed at a continuous and relatively uniform rate from the point of ignition to the point of use, usually a detonator.

- **Booster:** An explosive charge, usually of high strength and high detonation velocity, used to increase the efficiency of the initiation system of the main charge.

- **Magazine:** Any building or structure or container, other than an explosives manufacturing building, approved for the storage of explosive materials.



## STORING EXPLOSIVE MATERIALS

### LOCATION OF MAGAZINES

- **Always** separate magazines from other *magazines, inhabited buildings, highways, and passenger railways*. See IME Safety Library Publication No. 2, "American Table of Distances".
- **Never** allow *combustible material* to accumulate within 25 feet of the magazine.
- **Never** allow any *lighters, matches, open flame or other sources of ignition* within 50 feet of the magazine.

### CONSTRUCTION OF MAGAZINES

- **Always** be sure magazines are *solidly built and securely locked*, in accordance with federal regulations, to protect from weather, fire, and theft. Protect from penetration by bullets and missiles, as required by the classification of the explosive material.
- **Always** keep the inside of the magazine *clean, dry, cool and well ventilated*.
- **Always** post clearly visible "EXPLOSIVES – KEEP OFF" signs outside of the magazine. Locate signs so that a bullet passing directly through them cannot hit the magazine.

### CONTENTS OF MAGAZINES

- **Always** *clean up spills* promptly. Follow manufacturer's directions.
- **Always** store only explosive materials in a magazine.
- **Always** rotate stock so the oldest material in the magazine is the first out.
- **Never** store *detonators* with other *explosive materials*.
- **Never** use explosive materials which seem *deteriorated* before consulting your supervisor or the manufacturer.
- **Never** *exceed* recommended *storage time* and temperature for explosives. Check with your supervisor or the manufacturer.

## TRANSPORTING EXPLOSIVE MATERIALS

- **Always** keep *matches, lighters, open flame and other sources of ignition* at least 50 feet away from parked vehicles carrying explosive materials.
- **Always** follow federal, state and local laws and regulations concerning transportation.
- **Always** load and unload explosive materials carefully.
- **Never** park vehicles containing explosive materials *close to people* or congested areas.

## HANDLING EXPLOSIVE MATERIALS

### GENERAL

- **Always** use permissible explosive materials in flammable, gassy, or dusty atmospheres when required by applicable federal, state and local laws and regulations.
- **Always** keep explosive materials *away from children, unauthorized persons, and livestock.*
- **Never** use explosive materials unless *completely familiar* with safe procedures or under the direction of a qualified *supervisor.*
- **Never** handle explosive materials *during an electrical storm.* Find a safe location *away* from the explosive materials. When a storm is *approaching,* consult your supervisor. This applies to both surface and underground operations.
- **Never** fight fires involving explosive materials. Remove yourself and all other persons to a safe location and guard the area.
- **Never** put explosive materials in pockets of your clothing.

### PACKAGING

- **Always** close *partially used packages* of explosive materials.
- **Always** store explosives in their original package.
- **Never** touch *metal fasteners with metal slitters* when opening packages of explosive materials.
- **Never** mix different explosives in the same package.
- **Never** remove explosive material *from its package* unless designed to be used *in that manner.*

### PROTECTING EXPLOSIVE MATERIALS

- **Always** insure that there are no foreign objects or moisture in a fuse detonator before inserting the *safety fuse.*
- **Never** insert anything into a *fuse detonator,* except safety fuse.
- **Never** use explosive materials that have been water soaked, even if they now appear to be dried out.
- **Never** *investigate the contents* of a detonator.
- **Never** pull wires, safety fuse, shock tube, plastic tubing, or detonating cord out of any detonator or delay device.
- **Never** take apart, or alter the contents of any explosive materials.
- **Never** alter the composition of explosive materials.
- **Never** expose explosive materials to sources of heat exceeding 150 degrees F. or to open flame, unless such materials, or procedures for their use, have been recommended for such exposure.
- **Never** strike explosive materials with, or allow them to be hit by, objects other than *those required in loading.*

- **Never** subject explosive materials to excessive impact or *friction*
- **Never** shoot into explosive materials, magazines, or vehicles containing explosive materials

## USING EXPLOSIVE MATERIALS: DRILLING, LOADING, AND TAMPING

### DRILLING

- **Always** check for *unfired explosive materials* on surface or face before drilling.
- **Never** drill into *explosive materials*, or into a blasthole that has contained explosive materials
- **Never** start a drill hole in a bootleg.

### LOADING

- **Always** check each borehole to assure it is *safe* for loading.
- **Always** take *precautions* during *pneumatic loading* to prevent the accumulation of static electrical charges.
- **Never** place any unnecessary part of the body in *front* of borehole when loading, tamping or stemming.
- **Never** force explosive materials *into a borehole*.
- **Never** load a borehole containing *hot or burning material*. Temperatures above 150 degrees F. could be dangerous.
- **Never** spring a borehole near other holes loaded with explosive materials.
- **Never** stack *more explosive materials* than needed near working areas during loading.
- **Never** drop another cartridge directly on the primer

### TAMPING

- **Never** tamp a primer or explosive material removed from its cartridge
- **Never** tamp explosive materials with *metallic devices*, except jointed non-sparking poles with nonferrous metal connectors.
- **Never** tamp *violently*.
- **Never** kink or *damage* safety fuse, detonating cord, shock tube, plastic tubing, or wires of detonators when tamping.

## USING EXPLOSIVE MATERIALS: GENERAL INSTRUCTIONS FOR PRIMERS

### GENERAL

- **Never** prepare *more primers* than immediately needed.
- **Never** prepare primers *in a magazine* or near large quantities of *explosive materials*.
- **Never** slit, drop, twist, or tamp a primer

### PREPARING THE PRIMER

- **Always** insert the detonator completely into a hole in the explosive material made with a non-sparking punch designed for that purpose, or in the cap well of a manufactured booster.
- **Always** secure the detonator within the primer.
- **Always** point the detonator in the direction of the main explosive charge.
- **Always** secure the detonator to a primer cartridge so that no tension is placed on the cap wires, safety fuse, plastic tubing, or detonating cord at the point of entry into the detonator.
- **Never** use a cast primer or booster if the hole for the detonator is *too small*.
- **Never** enlarge a hole in a cast primer or booster to accept a detonator.
- **Never** punch explosive material that is *very hard or frozen*.
- **Never** force a detonator into explosive material.

### LOADING THE BOREHOLE

- **Always** use the *first* cartridge in the borehole as the primer cartridge where two inch diameter or smaller cartridges are used
- **Never** drop another cartridge directly on the primer.

## MAKING PRIMERS WITH ELECTRIC DETONATORS

### SMALL DIAMETER CARTRIDGES

(two inches in diameter or less) – Figure 1

- Step 1: Punch a hole straight into one end of cartridge.  
Step 2: Insert the detonator into the hole.  
Step 3: Tie leg wires around the cartridge using a half-hitch.

- **Never** pull the wires too *tightly*.  
This may break them or damage the insulation.

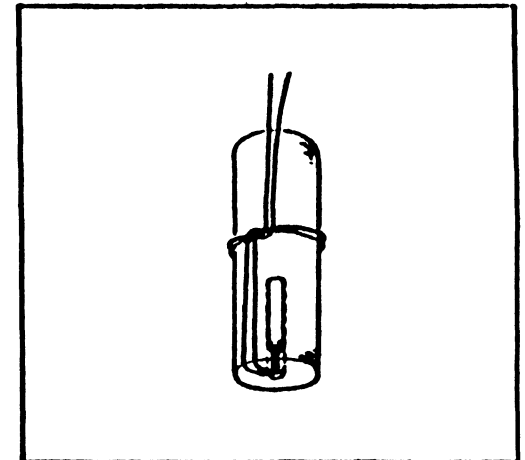


Figure 1: Recommended method of making primer with small diameter cartridge and electric detonator.

## LARGE DIAMETER CARTRIDGES

(more than two inches in diameter) – Figure 2

- Step 1: Punch a slanting hole from the center of one end of the cartridge coming out through the side two or more inches from the end.
- Step 2: Fold over the leg wires about 12 inches from the detonator to form a sharp bend.
- Step 3: Push the folded wires through the hole starting at the end of the cartridge and coming out through the side.
- Step 4: Open the folded wires and pass the loop over the other end of the cartridge.
- Step 5: Punch another hole straight into the end of the cartridge beside the first, insert the detonator in this hole, and take up all the slack in the wires.

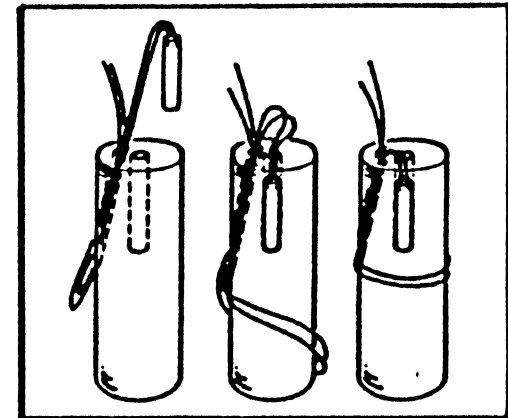


Figure 2: Recommended method of making primer with large diameter cartridge and electric detonator.

## CAST BOOSTERS – Figure 3

- **Always** follow the manufacturers's recommendation for the attachment and use of detonators with cast or manufactured boosters.

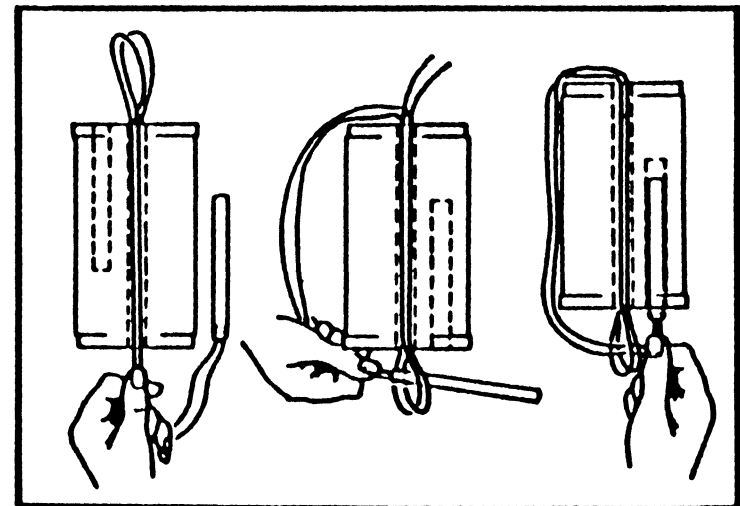


Figure 3: Recommended method of making primer with cast booster and electric detonator.

## PLASTIC FILM CARTRIDGES – Figure 4

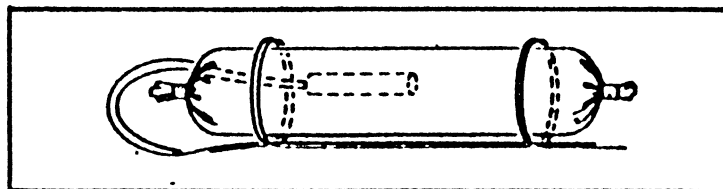


Figure 4: Recommended method of making primer with plastic film cartridge and electric detonator.

## MAKING PRIMERS WITH FUSE OR NONELECTRIC DETONATORS

### SIDE PRIMING METHOD – Figure 5

- Step 1: Punch a hole in the side of the cartridge. make the hole deeper than length of the detonator and pointed downward rather than across the cartridge.
- Step 2: Insert the detonator.
- Step 3: Take the safety fuse or plastic tubing to the cartridge to prevent the detonator from being pulled out of the cartridge.

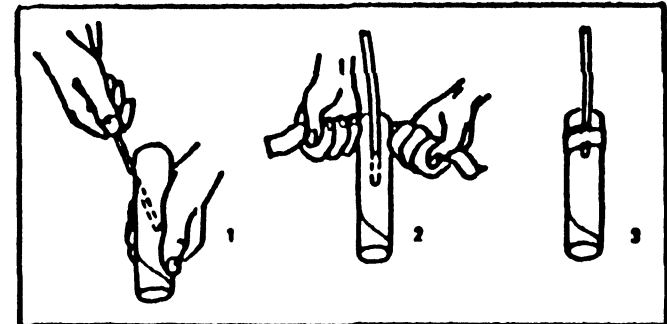


Figure 5: Recommended method of making primer using the side priming method.

### REVERSE PRIMING METHOD – Figure 6

- Step 1: Punch a hole straight into one end of the cartridge. make the hole deeper than the length of the detonator.
- Step 2: Insert the detonator.
- Step 3: Fold back the fuse or plastic tubing over the end so that it lies along the length of the cartridge.
- Step 4: Tape the fuse or plastic tubing to the cartridge.

**CAUTION:** If miniaturized detonating cord is used, the explosives must be *insensitive* to initiation by the detonating cord for this method to work.

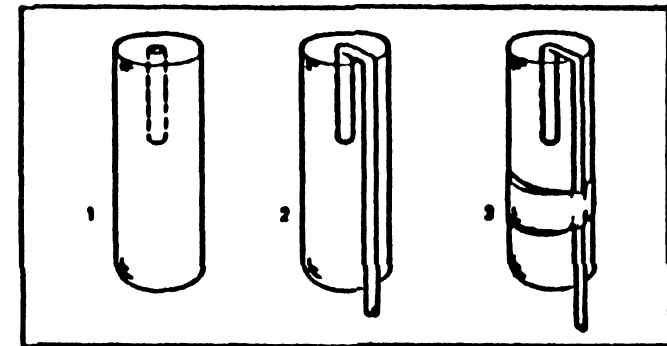


Figure 6: Recommended method for making primer by reverse priming method.

### PLASTIC FILM CARTRIDGE PRIMER – Figure 7

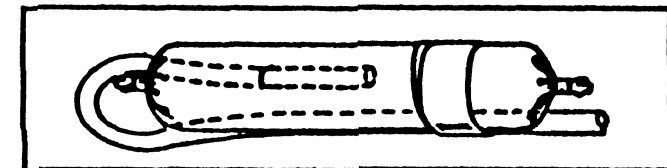


Figure 7: Recommended method of making primer with plastic film cartridge and fuse or nonelectric detonator.

## MAKING PRIMERS WITH DETONATING CORD

### DETONATING CORD WITH CAST BOOSTERS – Figure 8

- **Always** follow manufacturer's recommendations for using detonating cord with cast or manufactured boosters.

### MISCELLANEOUS TYPES OF PRIMERS

- **Always** follow manufacturer's recommendations for preparations of primers not covered elsewhere in these recommendations.

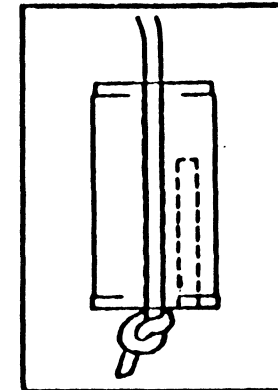


Figure 8: Recommended method for making primer with cast booster and detonating cord.

## USING EXPLOSIVE MATERIALS: GENERAL PRECAUTIONS

### PROTECTING YOURSELF

- **Always** keep explosive materials away from *food, eyes or skin. Flush areas of contact* with large quantities of water.
- **Always** avoid exposure to *excessive noise* from blasting. Comply with federal, state and local laws and regulations.
- **Always** fire the shot from a position *outside the blast area* away from an area where flyrock might occur.
- **Always** remain in a position away from the blast area postblast until fumes, dusts or mists have subsided.
- **Never** fire the shot from *in front* of the blast.
- **Never** breathe *dust or vapors* from explosive materials.

### PROTECTING OTHERS

- **Always** clear the immediate area of persons.
- **Always** post guards to prevent access to the blast area.
- **Always** sound adequate warning prior to the blast.
- **Always** use a *blasting mat* or other protective means when blasting close to residences or other occupied buildings or other locations where injury to persons or damage to property could occur as a result of flyrock.
- **Never** fire a blast without a *positive signal* from the person in charge.

### PROTECTING THE BLAST AREA

- **Always** clear the immediate area of vehicles, equipment, and extra explosive materials.
- **Always** design a blast to avoid excessive air blast, ground vibration, and flyrock. Comply with federal, state and local laws and regulations.
- **Never** allow any source of ignition within 50 feet of a blast site except approved safety fuse lighters.

## USING EXPLOSIVE MATERIALS: ELECTRIC INITIATION

### PREPARING THE ELECTRIC BLASTING CIRCUIT

- **Always** test the circuit for *continuity* and proper *resistance*, using a blasting galvanometer or an instrument specifically designed for testing electric detonators and circuits containing them.
- **Always** fire electric detonators with *firing currents* in the range recommended by the manufacturer.
- **Always** keep electric detonator wires or lead wires *disconnected* from the power source and shunted until ready to test or fire.
- **Always** keep the firing circuit completely *insulated* from ground or other conductors.
- **Always** be sure that all *wire ends* are clean before connecting.
- **Never** mix electric detonators made by *different manufacturers* in the same circuit.
- **Never** mix electric detonators of *different types* in a circuit, even if made by the same manufacturer, unless such use is approved by the manufacturer.
- **Never** use aluminum wire in a blasting circuit.
- **Never** make final hookup to power source until all personnel are clear of the blast area.

### PROTECTING AGAINST EXTRANEOUS ELECTRICITY

- **Never** load boreholes in open work *near electric power lines* unless the power line and detonator wires are anchored or are too short to reach the power line.
- **Never** handle or use electric detonators:
  - a) when stray currents are present.
  - b) during electrical storms
  - c) if static electricity is present.
- **Never** use electric detonators or blasting caps near *radio-frequency transmitters*. See IME Safety Library Publication No. 20, "Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the Use of Electric Blasting Caps."
- **Never** have electric power wires or cables near electric detonators or other explosive materials except at the time and for the purpose of firing the blast.



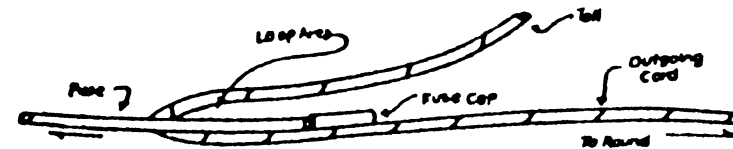
## USING EXPLOSIVE MATERIALS: DETONATING CORD INITIATION

- **Always** use a detonating cord *matched* to the blasting *methods* and type of explosive *materials* being used.
- **Always** handle detonating cord as *carefully* as other explosive materials.
- **Always** cut the detonating cord *from the spool* before loading the rest of the explosive material.
- **Always** make *tight connections*, following manufacturer's directions.
- **Always** attach detonators to detonating cord with *tape* or methods recommended by the manufacturer.
- **Always** point the detonators toward the *direction of detonation*. See Figure 9.
- **Always** attach detonators at least six inches from cut end of detonating cord.
- **Always** use a suitable booster to initiate wet detonating cord.
- **Never** make *loops, kinks, or sharp angles* in the cord which might direct the cord back toward the oncoming line of detonation.
- **Never** damage detonating cord prior to firing.
- **Never** attach detonators for initiating the blast to detonating cord until the blast area has been cleared and secured for the blast.
- **Never** use *damaged* detonating cord.



Figure 9: This method can be used with any type detonator.

### Attaching Detonator Fuse to Denotating Cord



A. Lay fuse detonator against cord.

B. Wrap cord around detonator at least 4 times.



C. Place remaining cord tail through loop.

D. Hold knot and pull outgoing cord.



\*Fuse detonator can also be taped to cord.

E. Pull knot tight.

Figure 10: Hangman's Knot - Detonator and Fuse.

## USING EXPLOSIVE MATERIALS: NONELECTRIC INITIATION

### GENERAL

- **Always** follow manufacturer's warnings and instructions, especially hookup procedures and safety precautions.
- **Always** discontinue operations during the approach and progress of electrical storms.
- **Never** hold nonelectric leads during firing. This may cause *injury* or *death*.
- **Never** use tubing or detonating cord leads for *any purpose other than that specified by manufacturer*.

### MINIATURIZED DETONATING CORD SYSTEM

- **Always** use explosives that are *insensitive* to initiation by the miniaturized detonating cord.
- **Never** join two sections of miniaturized detonating cord. A detonation will not pass through such a connection.

### GAS INITIATED SYSTEM

- **Always** stay away from the blast area *after connections* are prepared for firing, unless the entire system is properly purged and disconnected from the primary ignition source.
- **Always** use *tube protectors* or specially designed boosters.
- **Never** kink tubing.
- **Never** smoke or allow open flame within 50 feet of blasting machines used for gas initiated systems.

### SHOCK TUBE SYSTEM

- **Always** insure that shock tubing connections to detonating cord are at right angles to prevent angle cut-offs.
- **Always** lead shock tube to the hole in a straight line and keep it taut.
- **Never** cut or trim a factory assembled shock tube unit. Moisture may enter and cause failure.
- **Never** drive any vehicles over shock tube.
- **Never** tie together two lengths of shock tubing. A detonation will not pass through such a connection.

## USING EXPLOSIVE MATERIALS: FUSE DETONATOR AND SAFETY FUSE INITIATION

### GENERAL

- **Always** handle fuse carefully to avoid damaging the covering. In cold weather, warm slightly before using to avoid cracking the waterproofing.
- **Always** know the burning speed of the safety fuse by conducting a test burn of the fuse in use, to make sure you have time to reach safety after lighting.
- **Never** use lengths of safety fuse less than three feet.

- **Never** insert anything but fuse in the open end of a detonator.
- **Never** use fuse which has been kinked, bent sharply, or handled roughly in such a manner that the powder train may be interrupted.

### **STEPS FOR ASSEMBLING FUSE DETONATOR AND FUSE**

- Step 1: Wait until you are ready to insert fuse into fuse detonators before cutting it.
- Step 2: Cut off an inch or two to insure a dry end.
- Step 3: Measure correct length of fuse from roll and cut squarely across with a fuse cutter designed for this purpose; *not a knife*.
- Step 4: Visually inspect inside of detonator for foreign material or moisture; if wet or if foreign matter cannot be removed by pouring, do not use the detonator. Dispose of detonator in an approved manner.
- Step 5: Put the safety fuse gently against the powder charge.
- Step 6: Crimp the end of the fuse detonator where the fuse enters, using a cap crimper.

- **Always** cut off an inch or two to insure a dry end. Cut fuse squarely across with the proper tool designed for this purpose; *not a knife*.
- **Always** seat the fuse lightly against the detonator charge and avoid twisting after it is in place.
- **Always** insure that the detonator is securely crimped to the fuse.
- **Always** use waterproof crimp or waterproof the fuse-to-detonator joint in *wet work*.
- **Always** use cap crimpers to crimp the detonator to the safety fuse.
- **Never** twist the fuse inside the detonator.
- **Never** use a *knife* or *teeth* for crimping.
- **Never** use an open fuse detonator for a booster.
- **Never** cut fuse until you are ready to insert it into the detonator.
- **Never** crimp detonators by any means except a cap crimper designed for the purpose.
- **Never** attempt to remove a detonator from the fuse it is crimped to.

### **LIGHTING SAFETY FUSE**

- Step 1: Make sure you can reach a safe location after lighting with sufficient time before initiation.
- Step 2: Place sufficient stemming over the explosive material to protect it from fuse-generated heat and sparks.
- Step 3: Have a partner before lighting the fuse. One person should light the fuse, and the other should time and monitor the burn.
- Step 4: Light the safety fuse, using a specially designed lighter:  
*Single-fuse ignition – hot wire lighters, pull-wire lighters or thermalite connectors.*

- **Always** light fuse with a fuse lighter designed for the purpose.
- **Always** use the "buddy system" when lighting safety fuse – one lights the fuse, the other times and monitors.
- **Never** light fuse until sufficient stemming has been placed over the explosive to prevent sparks from coming into contact with the explosive.
- **Never** hold explosives in the hands when lighting fuse.
- **Never** drop or load a primer with a lighted safety fuse into a borehole.
- **Never** use safety fuse in agricultural blasting.
- **Never** use matches, cigarette lighters, cigarettes, pipes, cigars, carbide lamps, or other unsafe means to ignite safety fuse.

## USING EXPLOSIVE MATERIALS: AFTER-BLAST PROCEDURES

### DISPOSAL OF EXPLOSIVE MATERIALS

- **Always** treat *deteriorated or damaged* explosive materials with *special care*. They may be more hazardous than explosive materials in good condition.
- **Always** dispose of explosive materials using *proper methods*. Check with your supervisor or the manufacturer. If the manufacturer is not known, check with an IME member company listed in the front of this booklet.
- **Never** reuse any explosive material packaging.
- **Never** burn explosive materials packaging in a confined space.

### MISFIRES

- **Always** wait at least 30 minutes with fuse detonator misfires and at least 15 minutes with electric and other nonelectric detonator misfires, unless the manufacturer recommends otherwise, before returning to the blast area. Comply with federal, state and local laws and regulations.
- **Never** drill, bore, or pick out any explosive materials that have been misfired. Misfires should *ONLY* be handled by a competent experienced person knowledgeable of the blast design, including the location and type of *all* explosive materials.

### BLAST-GENERATED FUMES

- **Always** assume toxic fumes are present from all blasts or burning explosive materials and stay away until they have dissipated.
- **Always** comply with applicable federal, state and local laws and regulations for safe fume levels before returning to blast area.

### **REDUCING POST-BLAST FUME HAZARD**

- **Always** use the *largest diameter* cartridge that fits the job.
- **Always** use *water resistant* explosive materials in *wet conditions*, and fire the blast as soon as practicable after loading.
- **Always** *spray the muckpile* with water in accordance with federal, state and local laws and regulations.
- **Always** *avoid* conditions that might cause explosive materials to *burn* rather than detonate.
- **Never** use explosive materials that appear *deteriorated* or *damaged*.
- **Never** use *more explosive material* than necessary.
- **Never** add *combustible* materials to the explosive material *load*.
- **Never** use combustible materials for stemming.

### **USING EXPLOSIVE MATERIALS: SEISMIC PROSPECTING**

- **Always** secure explosive material at a *safe depth* in the borehole. Use shot anchors when needed.
- **Always** *secure* any casing that might blow out of the borehole.
- **Always** place the *detonator and/or primer* near the top of the explosive column, in the side or in the cap well of one of the top two cartridges.
- **Never** *approach* explosive material *thrown out* of the borehole by an explosion until you are sure that it is not burning.
- **Never** drop a seismic charge containing the primer cartridge.

**APACHE POWDER COMPANY / COAST FUSE**

**INCORPORATED**

**MANUFACTURERS OF EXPLOSIVES AND CHEMICALS**

P.O. BOX 700

BENSON, ARIZONA 85602 – U.S.A.

U. S. Department of Labor

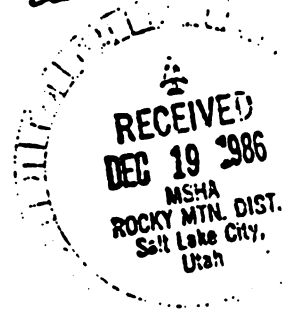
Mine Safety and Health Administration  
P O Box 25367  
Denver, Colorado 80225



*Hansen*  
*Correspondence file*

December 11, 1986

MEMORANDUM FOR: H. G. PLIMPTON  
Subdistrict Manager  
Rocky Mountain District  
Metal and Nonmetal Mine Safety and Health  
Salt Lake City, Utah



FROM

*for Stanley H. Townsend*  
RICHARD D. SMITH, ACTING CHAIRMAN  
Fatality Review Committee

SUBJECT : Fatality Review Committee decision on chargeability

Deceased: Wallace A. Muir

Case No.: 888 (86-M)

Date of accident: September 5, 1986 Date of death: September 5, 1986

Mine: Golden Phoenix, I.D. 42-01986, Duchesne County, Utah

Operating Co.: U.S. Forest Service and Ute Reservation Land

Decision: Nonchargeable

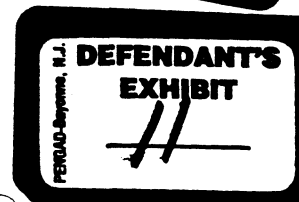
The fatality did not occur on mine property.

cc: Adm., MNMS&H

William C. Gardner, Dist. Mgr., MNMS&H, Rocky Mountain Dist.

E. L. Widgren

MKM:aes 6012



**U. S. Department of Labor**

Mine Safety and Health Administration  
1745 West 1700 South  
Salt Lake City, UT 84104



September 22, 1986

MEMORANDUM FOR: H. G. Plimpton, Subdistrict Manager *[Signature]*  
Salt Lake City Subdistrict

THROUGH: *[Signature]* Fred M. Hansen, Supervisory Mine Safety  
and Health Inspector, Salt Lake City  
Field Office

FROM: *[Signature]* Richard H. White, Mine Safety and Health  
Inspector, Salt Lake City Field Office

*[Signature]* William W. Wilson, Mine Safety & Health  
Inspector, Salt Lake City Field Office

SUBJECT: Investigation of Fatal Blasting Accident  
on September 5, 1986 at the Golden  
Phoenix, I.D. No. 42-01986

Wallace A. Muir, age 57 years, Social Security No. 2019, was fatally injured when a drift round which was being ignited went off. Douglas R. Bailey, age 45 years, Social Security No. 0366, was also injured in the blast.

H. G. Plimpton, Subdistrict Manager, Salt Lake City Subdistrict, Mine Safety and Health Administration, was notified of the accident by telephone from the Duchesne County, Utah Sheriff's dispatcher at about 2100 on September 5, 1986. An investigation was started on September 6, 1986.

Muir (victim), Bailey (injured), and Marlo Jenkins started work at 0730, September 5, 1986. Bailey stayed outside during the morning while Jenkins and Muir mucked out the previous day's round. When mucking was completed, the two men set up a jackleg and started drilling. Bailey, the only experienced miner, directed Jenkins and Muir where to drill the holes. By mid-afternoon, a total of 30, 4-foot deep holes had been drilled in the face. The round was then loaded by Bailey and Muir, using capped fuses with 1 stick of dynamite as a primer and ANFO. Jenkins carried the remaining explosives out of the drift leaving Bailey and Muir to spit the loaded drift round.

At approximately 1430, Jenkins was approximately 50 feet outside the portal when he heard the round start going off. Running inside, he found Bailey crawling out the finger, bleeding heavily. Bailey stopped Jenkins from going any further to see where Muir was. Jenkins assisted Bailey to the portal as the rest of the round went off. *[Signature]*

directed Jenkins to turn on the air compressor and run the air hose into the drift as far as he could to clear the blast smoke. A few minutes later, Bailey told Jenkins that he wasn't going to make it unless he received medical treatment soon. Jenkins and Bailey got in their pickup, leaving Muir in the drift.

Jenkins transported Bailey to the Duchesne County Hospital in Roosevelt, Utah, stopping in Neola, Utah, to call the Duchesne County Sheriff's Office to advise them of the accident. Bailey was left at the hospital for treatment. Duchesne County Deputy Sheriff, Jerry Foote and Jenkins then traveled back to the mine to look for Muir. Another sheriff's deputy and other rescue personnel arrived at the mine site and assisted with the recovery work. Muir's body was discovered buried under the muck pile. Muir was dug out and transported to the Duchesne County Hospital where he was pronounced DOA. An autopsy was performed the next day by the Utah State Medical Examiner's office. The cause of death was listed as blast force injuries and compression asphyxia (suffocation.)

An MSHA Legal Identity Report and Federal Mine Identification Number were obtained for the purpose of this investigation.

Numerous facts have emerged during this investigation:

1. The 32 claims of the Golden Phoenix were first recorded in 1977.
2. The claims were turned over to Linda Muir (and family) in June 1985.
3. The U. S. Forest Service and Bureau of Land Management were notified in June 1985 and appropriate forms filed. The forest service stated this was not a mine "it fit the definition of a treasure hunt." The State of Utah Natural Resources Division (oil, gas and mining) said this was not mining, just exploratory drilling (assessment work.)
4. The purpose of working these claims was to find an old, abandoned spanish gold mine that according to legend, is within several feet of where the present Golden Phoenix is located.
5. The claim was located on a dead-end dirt road put in by the claim owner to gain access. At present, the main declined drift is 134 feet from the portal to the face with one side drift 33 feet back from the main drift face and 16 feet deep. The main drift measured 8 feet high and 10 feet wide with the side drift measuring 5 feet wide and 7 feet high.





6. The claims are located on U. S. Forest Service and Ute Indian Reservation land.

7. No product was ever transported from the claim area. The muck removed was dumped outside the portal.

8. Assessment work was done each year to satisfy the minimum \$100.00 per claim necessary to maintain the claims. According to Linda Muir, Owner, \$4,700.00 worth of work had been done in 1986.

9. On page 3 of the Mine Safety and Health Act of 1977, Section 4, the language states to be a mine subject to the Act, the products (of the mine) have to "enter commerce, or the operations or products of which affect commerce."

10. The claim owner did not have any paid employees, only family and close friends at the site.

11. While this was a tragic accident it should not be charged to the mining industry as this was not a mine in any sense of the word. The accident resulted from the total lack of knowledge of or the respect for the explosives used.

Enclosures (2)



Case No. 880705719

SEVENTH DISTRICT COURT  
Grand County

EVELYN MUIR

**Plaintiff,**

**vs W.H. BURT EXPLOSIVES  
APACHE POWDER COMPANY**

**Defendant.**

FILED **JAN 28 1994**

CLERK OF THE COURT  
BY                       
Deputy

NO.	P	D	EXHIBIT	ADMIT	
				OFF	
1.	X		PHOTO FRAMED INSIDE MINE	X	X
2.	X		PHOTO FRAMED, INSIDE MINE	X	X
3.	X		PHOTO FRAMED, INSIDE MINE	X	X
4.	X		PORTRAIT OF WALLACE AND EVELYN MUIR	X	X
5.		X	PACKET CONTAINING SPITTER FUSE	X	X
6.		X	INVOICE (BURT EXPLOSIVES) 8/26/86	X	X
7.	X		VARIOUS LENGTHS SAFETY FUSE	X	X
8.		X	DO'S AND DONT'S	X	X
9.	X		INCOME TAX RETURNS	X	X
10.		X	PHOTO MAIN OPENING OF MINE	X	X
11.		X	BLASTERS HANDBOOK	X	NO
12.		X	PHOTO - ORIGINAL TUNNEL AND ENTRANCE OF CROSSCUT	X	X
13.		X	PHOTO - VIEW TO SIDE - BLASTED AREA	X	X
14.		X	PHOTO - LOOKING DOWN ON CROSSCUT	X	X
15.		X	PHOTO - FUSE PRIMER	X	X
16.		X	PHOTO - FUSE PRIMER	X	X
17.		X	PHOTO - SPITTER FUSE	X	X
18.		X	MODEL - FUSE MAKING	X	X
19.		X	POSTER BOARD-STAGES OF MANUFACTURING FUSE-APACHE	X	X
20.		X	POSTER BOARD	NO	NO
21.		X	PHOTO - SPINNING DIE	X	X
22.		X	PHOTO - SPINNING MACHINES	X	X
23.		X	PHOTO - THREAD DETECTOR	X	X
24.		X	PHOTO - THREAD DETECTOR	X	X
25.		X	SPINNING DIE	X	X

Case No. 880705719

EVELYN MUIR

Plaintiff,

VS W.H. BURT EXPLOSIVES  
APACHE POWDER

Defendant.

NO.	P	D	EXHIBIT	ADMIT OFF	
26.		X	"SHUT OFF" PIECE OF MACHINERY-BROKEN JUTE DETECTOR	X	X
27.		X	PIECE OF MACHINERY-LINKAGE DETECTOR	X	X
28.		X	SPRINGLOAD TO LINKAGE	X	X
29.		X	PHOTO- CYLINDER CONTAINING ASPHALT RAW CORE	X	X
30.		X	PHOTO- APPLICATION OF ASPHALT	X	X
31.		X	PHOTO- POLYETHYLENE APPLICATION	X	X
32.		X	PHOTO- MANUFACTURE STIPULATION	X	X
33.		X	PHOTO- CLOSE-UP VIEW OF OVER AND UNDER DETECTOR	X	X
34.		X	PHOTO- CORE - FUSE SPINNING	X	X
35.		X	PHOTO- ROLL OF SAFETY FUSE	X	X
36.		X	PHOTO- WAXING COATING PROCESS	X	X
37.		X	PHOTO - LARGE REELS	X	X
38.		X	EXHIBIT #1 OF WILSON DEPOSITION	XX	X
39.		X	FOLDED EMPTY PACKING CASE-"SEQUOIA"-COAST	X	X
40.		X	PIECE OF CORE FROM SPINNING MACHINE	X	X
41.		X	SKETCH OF DR. URSENBACH'S TEST FUSE RESULTS	X	X
42.	X		RECORD (APACHE'S) TAG NOS, MACHINE NOS, ETC.	X	X
43.	X		COPIES OF TAGS OF PLASTIC SEQUOIA SAFETY FUSE	X	X
44.	X		SET OF RECORDS - BURNING RATES	X	X
45.	X		PACKING RECORD	X	X
46.	X		RECORD OF FAST FUSE BURNING RATES	X	X
47.	X		SAFETY FUSE W/CONNECTOR	X	X
48.	X		SAFETY FUSE W/O CONNECTOR	X	X
49.		X	RECORDS PULLED BY LEIDNER	X	X
50.		X	RECORDS PULLED BY LEIDNER	X	X

Case No. 880705719

EVELYN MUIR

Plaintiff,

VS W. H. BURT EXPLOSIVES  
APACHE POWDER

Defendant.

NO.	P	D	EXHIBIT	ADMIT	
				OFF	
51.		X	RECORDS PULLED BY LEIDNER/PRODUCTION OF FUSE	X	X
52.		X	RECORDS PULLED BY LEIDNER	X	X
53.		X	INVOICE BURT EXPLOSIVES SOLD TO DAVID JONES	X	X
54.		X	FOOTE'S REPORT	X	X
55.		X	COSTS OF FUSE BURT'S EXPLOSIVE	X	X
56.		X	BURT EXPLOSIVES' COSTS PER ROUND	X	X
57.	X		BROCHURE OF EXHAUST PURIFIER	X	X
58.	X		COVER SHEET - ECS DIESEL ENGINE	X	X
59.	X		PURIFIER "BENEFITS"	X	X
60.	X		PICTURE - DIESEL ENGINE EXHAUSE PURIFIER	X	X
61.					
62.					
63.					
64.			<i>Circle exhibits mailed to Supreme Court w/ the Record. Paper Exhibits requested per Jennifer.</i>		
65.					
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#### Eight — Majority

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or other brief answer

or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) **General verdict accompanied by answer to interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58A. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58A in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

#### Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) **Motion for directed verdict; when made; effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) **Motion for judgment notwithstanding the verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed

verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

#### (c) Same: Conditional rulings on grant of motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) **Same: Denial of motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

#### Rule 51. Instructions to jury; objections.

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.